No. 14-8349

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY TYRONE FOSTER,
Petitioner,

v.

BRUCE CHATMAN, WARDEN,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Georgia

REPLY TO GEORGIA'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO GEORGIA'S OPPOSITION TO CERTIORARI

This is an extraordinary case in which Georgia is seeking to execute Timothy Tyrone Foster, a black man convicted of killing a white woman, despite direct and overwhelming evidence that the prosecution discriminated on the basis of race to secure an all-white jury at his capital trial.[1]

Georgia claims that Foster has presented "no evidence" of discriminatory intent under *Batson v. Kentucky*, 476 U.S. 79 (1986). Georgia's Br. at 11. As an initial matter, the prosecution struck all four black prospective jurors, T. 1337-43, proffered an absurd number of "race-neutral" reasons for the four strikes, most of which it never addressed in voir dire, T. 1361-76,[2] and argued for a death sentence to "deter other people out there in the projects," T. 2505.[3] More importantly, in the habeas proceedings below, Foster presented the prosecution's notes from jury selection, which reflect an explicit reliance on race in the jury selection process. Foster's petition for certiorari contains images and explanations of the prosecution's notes. *See* Petition at 5-8.

Georgia declines to acknowledge many of the notes at issue. It makes no attempt to explain the juror questionnaires on which the prosecution circled the

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[1] In the Georgia Supreme Court, this case was referred to as *Timothy Tyrone Foster v. Carl Humphrey, Warden*. Petitioner Foster referred to the case the same way in his petition for certiorari in this Court. In its brief in opposition to certiorari, Georgia lists Bruce Chatman, Warden, as the respondent because Chatman has replaced Carl Humphrey as the warden of the Georgia Diagnostic and Classification Prison. *See* Sup. Ct. R. 35(3) (providing for substitution of parties in these circumstances). Foster does the same in this reply.

[2] *See Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 246 (2005) ("The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.").

[3] As noted in Foster's petition for certiorari, black families occupied more than ninety percent of the units in the local housing projects at the time of the trial. R. 551.

word "BLACK," the pages on which the prosecution identified black prospective jurors as "B#1," "B#2," and "B#3," or the strike lists that contradict the "race-neutral" explanation provided by the prosecution for the strike of black prospective juror Marilyn Garrett.[4] Those notes provide powerful evidence of discrimination, all unrebutted by Georgia.

With respect to other notes, Georgia acknowledges them but seeks to minimize their significance. This is the approach taken with the venire lists on which the prosecution highlighted the names of the black prospective jurors in green.[5] Georgia suggests that the lists do not establish discriminatory intent on the part of the prosecutors because "'multiple staff members'" from the District Attorney's office were involved in making notes on the lists and "'[t]he motivation for passing lists and notes on individual jurors was to help pick a fair jury.'" Georgia's Br. at 9 (quoting Order at 17 (Butts Co. Sup. Ct. Dec. 9, 2013)). That argument falls flat for two reasons.

First, Georgia cannot assert, on one hand, that the District Attorney relied on his subordinates' notes "to help pick a fair jury," while at the same time arguing that the District Attorney should not be held responsible for his subordinates' discrimination. The staff members in the District Attorney's office, who were asked to help, knew exactly the type of information the prosecutors wanted. The reality is

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[4] *See* H. 961, 967, 973, 979, 984 (the juror questionnaires with the race question circled); H. 945-47 (the notes identifying black prospective jurors as "B#1," "B#2," and "B#3"); H. 939, 950, 951, 999 (the strike lists showing that the prosecution fabricated its explanation for striking Garrett).

[5] *See* H. 903-26 (the highlighted venire lists).

that the process of circulating lists and notes did help the prosecution select a specific type of jury—a jury that included only white people.

Second, the fact that the entire District Attorney's office was involved in creating the discriminatory notes makes the problem worse, not better. An office in which race discrimination is so engrained that lists of this kind are circulated broadly is one in which *Batson* violations are altogether more likely. *See Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 347 (2003) (inferring discrimination from the fact that "the culture of the District Attorney's Office" was suffused with bias).

Georgia also seeks to minimize the notes of Clayton Lundy, the prosecution's investigator. Lundy stated in a post-trial affidavit that race did not play a role in the prosecution's jury selection process. *See* R. 557. But in the original draft of the affidavit—which is now in evidence—Lundy fretted over what the prosecution should do "[i]f it comes down to having to pick one of the black jurors." H. 995. Georgia argues that Lundy's discriminatory viewpoint should not be attributed to the prosecutors because it was "solely [his] opinion." Georgia's Br. at 11-12. However, the prosecutors stated expressly that they relied on Lundy, who must have known what was important to them, when striking several black prospective jurors. *See, e.g.*, M.N.T. 41; *see also* R. 571-73 (the trial court acknowledging the prosecution's reliance on Lundy).[6] As with the highlighted venire lists, the prosecutors should not be permitted to escape responsibility for discrimination by blaming their subordinates.

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[6] Remarkably, Georgia relies on Lundy's statements denying discrimination, State's Br. at 10-12, while at the same time distancing the prosecutors from his discriminatory acts, State's Br. at 12.

After discussing the highlighted lists and Lundy, Georgia emphasizes that the prosecutors *said* they did not discriminate. Georgia's Br. at 12. If that fact were significant, *Batson* would have little meaning. This Court actually stated in *Batson* itself that a prosecutor cannot defeat a claim of race discrimination "merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'" *Batson*, 476 U.S. at 97 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)). Moreover, these are the same prosecutors who not only filled their files with discriminatory notes, but also withheld those notes at trial and on direct appeal in an effort to prevent the finding of a *Batson* violation.[7]

When addressing the "race-neutral" reasons proffered by the prosecution, Georgia takes on the wrong issue. Georgia's Br. at 14-25. It states repeatedly that the proffered reasons are not "inherently discriminatory."[8] But the question of whether the reasons are facially race-neutral or "inherently discriminatory" is a question for step two of the *Batson* analysis. *See Hernandez v. New York*, 500 U.S. 352, 360 (1993) ("A neutral explanation in the context of [step two] means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a

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[7] Foster requested the prosecution's notes from jury selection in both the trial court and the Georgia Supreme Court. The prosecution successfully opposed Foster's efforts. *See Foster v. State*, 374 S.E.2d 188, 192 (Ga. 1988) ("The trial court did not err by denying Foster's post-trial motion to review in camera the state's jury-selection notes.").

[8] *See* Georgia's Br. at 5 ("Contrary to Petitioner's claim, the state habeas court found that despite the newly tendered evidence, Petitioner failed to demonstrate the strikes were *inherently discriminatory* . . . .") (emphasis added), 17 ("The multiple race neutral reasons offered by the State prompted the trial court, the Georgia Supreme Court and the state habeas court to find the State's explanation for its dismissal of Mr. Hood race neutral and not *inherently discriminatory*.") (emphasis added).

discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."). This case involves step three, not step two. See Order at 15 (Butts Co. Sup. Ct. Dec. 9, 2013). The question at step three is whether the proffered reasons were *the actual reasons* for the strikes or a pretext for race discrimination. *See Miller-El I*, 537 U.S. at 339 ("In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." (quoting *Hernandez*, 500 U.S. at 365)).

The proper way to conduct a step three analysis is to consider "all relevant circumstances" to determine whether the proffered reasons were genuine. *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 240 (2005); *Batson*, 476 U.S. at 96-97.[9] Georgia fails to engage in that analysis. Like the state habeas court, it places substantial weight on the trial court and direct appeal rulings. *See* Georgia's Br. at 13-14 ("It is clear that the trial court carefully considered the State's reasons for striking the four jurors following Petitioner's *Batson* challenge in thorough questioning of the State both at trial and during the hearing on the motion for new trial and found the reasoning race neutral."); *see also* Order at 17 (Butts Co. Sup. Ct. Dec. 9, 2013) ("Importantly, this court notes that on direct appeal, trial counsel raised a claim that the trial court erred in finding that the prosecution provided race-neutral reasons for striking the four African-American jurors. The Georgia

[9] *See also Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) ("[A]ll of the circumstances that bear upon the issue of racial animosity must be consulted. Here, as just one example, if there were persisting doubts as to the outcome, a court would be required to consider the strike of Ms. Scott for the bearing it might have upon the strike of Mr. Brooks.").

Supreme Court affirmed the trial court's denial of this claim, finding that the prosecutor's explanations were related to the case to be tried, and were clear and reasonably specific."). Deferring to the trial and appellate rulings necessarily means failing to consider the ways in which the prosecution's notes, which were not available at the time of the trial and direct appeal, undermine the credibility of the "race neutral" reasons proffered for the strikes.

The strike of Marilyn Garrett demonstrates the problem with Georgia's analysis. The prosecutor explained that he had listed Garrett as "questionable" in his notes and decided to strike her only after Shirley Powell, another black prospective juror, was excused for cause. R. 438-39. That explanation may have seemed plausible at the time. *See* R. 574-75 (the trial court repeating the explanation). But none of it was true, as the prosecution's notes reveal. The prosecution had four strike lists, and Garrett was a "No" on all four. H. 939, 950, 951, 999. If it was known that the prosecutor was fabricating his explanations, the "race-neutral" reasons that purportedly supported the strikes of Garrett and others would not have been viewed as credible.

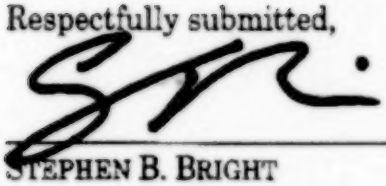
The strike of Eddie Hood provides another example. In the trial court, the prosecution proffered many "race-neutral" reasons for striking Hood, including his son's age, his wife's occupation, and his religious affiliation. H. 979-81. The trial court and the direct appeal court accepted those reasons as genuine. R. 567-70; *Foster v. State*, 374 S.E.2d 188, 192 (Ga. 1988). But the prosecution's notes change everything. They show that the prosecutors singled out Hood based on race,

identifying him as "B#2." H. 946. In addition, they circled four items on his juror questionnaire—the three items noted above and his race: "BLACK." H. 979-81. If race was not a concern, there would have been no reason for the prosecution to circle it on the questionnaire along with other issues it claimed to view as important. In light of that evidence, it strains credulity to accept the prosecution's representation that race was not a factor in the strike of Hood.

The critical point is that Georgia's approach, which involves viewing the proffered reasons separately and distinctly from the prosecution's notes, undercuts the force of *Batson*. The only way to conduct a constitutionally sound step three analysis in this case is to consider everything together—the race of the defendant, the race of the victim, the strikes of each and every black prospective juror, the "race-neutral" reasons proffered by the prosecution for the strikes, the evidence and arguments at trial, and the prosecution's notes, questionnaires, and other lists. No court has ever done that. The exceptional circumstances of this case warrant this Court's intervention.

For those reasons, Foster respectfully requests that this Court grant certiorari and evaluate the *Batson* issue in this capital case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Stephen B. Bright, hereby declare that on March 24, 2015, I served this Reply to Georgia's Opposition to Petition for Writ of Certiorari on the State of Georgia by depositing an envelope containing the petition in the United States mail, with first-class postage prepaid, addressed as follows:

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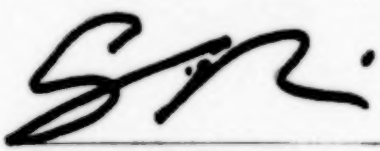
Respectfully submitted,



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